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DONOR INTENT, DISASTER RELIEF, EDUCATION, AND POLICY

*Marian Conway, Ph.D.**

I. INTRODUCTION

Disasters and crises present difficulties of all types; getting aid and supplies to victims, the logistics involved in getting those necessary provisions to the location of the disaster, and raising funds to cover the essential aid for mitigation and rebuilding. A series of disasters, such as the triple hurricanes of 2017, Harvey, Irma, and Maria, present another challenge, raising funds to assist equally, dispersing monies out based on need and not on the storm that came first. Towards that end, the donors of those dollars must understand the power they have in their intent, and how they can most effectively use that power.

The nonprofit world spins on donative intent, what is commonly called donor intent, going as far as giving a good portion of it an important legal name, *cy pres* (as near as possible to the intention). A grantor's donative intent is an issue of fact -- how the donor intends the gift to be used by the nonprofit is as concrete a transaction as an exchange of money for goods; *cy pres* court rulings are required to alter the intent of a donation. However, what significance should we give donor intent in the event of a disaster? Can the individual donor be relied on to make the correct decision regarding the target for their donation? Or is donor intent the last word, regardless of the motivation? This is important because the cause and application

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cannot be changed once the individual donor hits the send button on a Text-To contribution. It is critical, too, when there are a series of catastrophes and the last one gets diminished attention and funds. In a disaster, the needs change from the first few minutes of a tornado's touchdown to the aftermath; the aid needed on the first day after a storm may be drastically different from the second day. When Hurricane Harvey first touched down, boats were desperately needed for evacuation. Once the water receded, the need changed from evacuation to shelter and food. Moreover, once the storm finally passes, there is assessment of damages, and then the rebuild. This leaves us with a question: can we create policy for nonprofits that respects *cy pres* and million-dollar endowments, the intent of the individual who donates just ten dollars, and is able to be flexible enough to address real need as it changes?

II. 2017, THE YEAR OF POWERFUL HURRICANES

In 2017, Hurricane Harvey came onshore on August 26, Hurricane Irma on or about September 10, and Hurricane Maria on September 20. These storms were devastating. Not only were lives lost but damage to buildings and infrastructure amounted to more than a billion dollars in damages. According to the American Red Cross, over \$429 million dollars was raised in relief for Harvey, \$68 million for Irma, and \$36 million for Maria.¹

It is difficult to determine why a disparity exists in the amount of dollars raised by the American Red Cross across the three storms. This disparity can be seen at the federal level as well. A research paper from faculty at the Department of Health Management and Policy, University of Michigan School of Public Health, published by BMJ Global Health, concludes that “the disaster responses to hurricanes Harvey, Irma and Maria were different to the degree that they do not align with storm severity or prevention and recovery needs and may substantially affect deaths and recovery rates. Increases in mortality and adverse health outcomes due to differentiated disaster response and recovery efforts may promote inequity among

¹ See American Red Cross, *At-a-Glance: Our Response to Wildfires & Hurricanes*, AMERICAN RED CROSS (Nov. 8, 2017), <https://www.redcross.org/about-us/news-and-events/news/Our-Response-to-Harvey-and-Irma.html>.

populations that receive less aid.”² The monetary aid and the people responding decreased from the first storm to the third storm: over 9,500 disaster workers were on the ground for Harvey, 7,000 for Irma, and 1,200 for Maria.³ The paper reasoned that there were a multitude of reasons that led to the funding inequity. For individual donors it could be donor fatigue— there had been so many disasters in just three weeks. For large donors and federal aid, the disparity could be explained by donor fatigue or the difficulties in accessing geographical areas affected such as those in Puerto Rico and the U.S. Virgin Islands. Finally, the imbalance could be attributed to racial bias and/or donor perception.

Would some flexibility on the nonprofit side of the equation have helped the variances in aid for the geographical areas affected by hurricanes Harvey, Irma, and Maria? While flexibility in the interpretation of donor intent would not have eliminated the inconsistency in funding, some changes in the interpretation and application of individual donations may have been helpful. It is worth the effort to explore this possibility.

III. WHAT DONORS WANT

Individual giving to a disaster relief organization is usually an emotional response. There are as many motivators as there are givers: donors want to help, they feel compassion for those who are suffering, it follows their religious upbringing, they want to pay it forward, or they simply connect with the victims. However, these donors do not necessarily know what happens with the ten dollars they just texted out or the hundred dollar check they sent to a nonprofit.

The American Red Cross mission statement is, “The American Red Cross prevents and alleviates human suffering in the face of emergencies by mobilizing the power of volunteers and the generosity of donors.”⁴ They are first responders; they are the ones that are first

² See Charley E. Willison et. al., *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, BRITISH MEDICAL JOURNAL OF GLOBAL HEALTH, Jan. 2019, <https://gh.bmj.com/content/4/1/e001191>.

³ *Id.*

⁴ See American Red Cross, *Mission & Values*, AMERICAN RED CROSS, <https://www.redcross.org/about-us/who-we-are/mission-and-values.html> (last visited June 10, 2019).

in after a catastrophe. They stock portable kitchens, bring blankets and food, and take names of missing loved ones to find them. Despite their good intentions, the rigidity of the interpretation of the donors' intent and public outcry have caused the American Red Cross to restructure and rebuild their services. That donor intent issue has also placed them in an awkward and legally ambiguous position of giving donated dollars directly to individuals.

For example, donations flooded into the American Red Cross and other nonprofits after the terrorist attacks on September 11, 2001. The public perception of how the donations should have been used in light of the enormous loss of life did not necessarily follow legal guidelines for disaster relief organizations.⁵ The amount of money collected by the American Red Cross and others was more than was needed for those first in on a disaster, but the public would not allow the excess funds to be spent on any other disaster.⁶ This outcry resulted in the New York State Attorney General, Elliott Spitzer, threatening a lawsuit because of the failure to observe donor intent.⁷ The American Red Cross, the only public charity chartered by Congress as a treaty obligation organization, which did not have as much oversight as other nonprofits, agreed to directly provide 9/11 victims' families money.⁸

Prospective donors see a family suffering in the news reports from a crisis and their natural desire is to help that family, assist the very people that are crying as they are interviewed. The average donor is not aware that if they donate to a nonprofit organization it cannot go to that specific family directly. The IRS guidelines forbid nonprofits from just giving individuals checks, unless very specific guidelines are met.⁹ The gifts become taxable if the following is not in place: in a procedure approved in advance, a nonprofit can provide a grant to an individual if it is a scholarship for a variety of expenses such as tuition, books, research, etc., at an education institution with a regular faculty and curriculum; and the grant can be given to an individual producing art, a research project, or teaching. A grant can also constitute an award

⁵ See Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHICAGO-KENT LAW REV. 977 (2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Internal Revenue Service, *Grants to Individuals*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/private-foundations/grants-to-individuals> (last visited June 10, 2019).

if the recipient is selected from the general population. A gift that is taxable has less value and may become a burden to the grantee.

In response to the 9/11 donor confusion and pressure from lawmakers, the donation page for the American Red Cross is broad and not specific to a particular crisis: “Where It Is Needed Most” and “Disaster Relief” are the buttons for emergency uses.¹⁰

That type of explanation on a website does assist with allowing the disaster relief agency itself to pinpoint need rather than the donors, but informing the public about donor intent – why giving broadly and unrestrictedly benefits disaster victims – does not appear to be part of that strategy.

When the general public sees a commercial on television for a nonprofit that states “every penny donated goes to help this hungry child,” it is a disservice to the public. This is a missed opportunity to educate the community on how donated funds are spent. The public may not consider that the television commercial, the editors, the sound people, the insurance, and the filming site all cost money. If the public was informed, it would assist the education process and make the donors understand how their intent can affect the delivery of services.

It appears that dollars contributed for Hurricane Harvey stayed in Texas; donor intent was translated as geographical. When the American Red Cross closed shelters in Texas, as people moved to more permanent housing, and it was no longer needed to stock the portable kitchens, the volunteers moved on and funds were directed to other organizations that were in the rebuilding business in Texas. After the investment in the disaster in Texas, Towards the end of that September, there were many fewer dollars going to the storm disaster in Puerto Rico.¹¹

IV. DONOR INTENT AND POLICY

What if donor intent was translated to hurricanes or disasters in general? What if donor intent was directed to the organization and not specific regions or storms? If donor intent was translated to disasters in general, nonprofit organizations could then direct the relief to where

¹⁰ See American Red Cross, *Donate Now: Online Donations*, AMERICAN RED CROSS, <https://www.redcross.org/donate/donation.html/> (last visited July 27, 2019).

¹¹ Eric Levenson, *3 Storms, 3 Responses: Comparing Harvey, Irma and Maria*, CNN, <https://www.cnn.com/2017/09/26/us/response-harvey-irma-maria/index.html> (last updated Sept. 27, 2017).

it would do the best good; there would be more of an ability to react to each catastrophe. When the gifts are large or a charitable trust is created, there is a legal path for donors to follow. When the original intent of the trust is altered because it is no longer required due to a change in the purpose or the completion of the original action – for example, when a temporary disaster shelter closed because people have moved on to other housing – the donor can specify alternatives through the *cy pres* default rule.

Professor Susan N. Gary indicated in her 2010 paper on the problems of donor intent that “[c]y pres changes the intent of the donor, while deviation permits a change that will help a charity to carry out the donor’s intent.”¹² Donor intent policies in nonprofit fundraising can direct the use of collected dollars, but those policies have to be communicated before the checks are written.

John Picton, a professor at the University of Liverpool, stated that “[w]hile there is a widely held view that the *cy-pres* process has fidelity to the donor’s intention at its heart, policy concerns are in fact the main priority of the courts.”¹³ He posits that a policy frame has precedence over donor intent. It would be a positive change if a policy that spelled out how the emergency contributions are handled appeared in an obvious location, such as under the charity’s mission statement. A strong policy removes any doubt about how money may be spent to alleviate suffering after a major storm. However, the policy is useless if it is not communicated to the public. Moreover, the public and the lawmakers must be educated on the justifications and process behind the structuring of the policy.

In order to inform the public, changes need to happen before a storm occurs, before the wildfire, or before the plane crash. The commercial of the first-in charity that responds to disasters has to say that donors’ dollars will be used to assist those victims of disasters immediately, without specifying a place. The commercial for another organization has to say that donations are to rebuild a community after the first-in responders have done their work. We have fallen into a system where the donors are regulating the way money is spent, rather than the experienced and knowledgeable organization directing the funds. Professional philanthropy also commits this error,, with foundations telling an organization about programs they will fund

¹² Gary, *supra* note 5.

¹³ John Picton, *Donor Intention and Dialectic Legal Policy Frames*. RESEARCH HANDBOOK ON NOT-FOR-PROFIT LAW (2018).

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rather than letting the charity do the work the best way it knows how. It takes years to recover from hurricanes such as those the U.S. experienced in 2017. The funding of the rebuild requires a great deal of dollars placed in the right organizations. Recovery from a disaster takes an educated community of generous donors with the least amount of strings attached to the funds. Donor intent needs to be an educated process.